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ASSOCIATION OF LOCAL TELEVISION STATIONS

WRITTEN EX PARTE COMMUNICATIONS
CS Docket No. 98-120

December 29, 1999

The Honorable Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: MM Docket No. 98-120

Dear Ms. Salas:

We are filing herewith two copies of a series of written ex parte communications with the members of the Commission and Commission staff listed on the attached page. Apart from the cover letter, the text of these documents consists of excerpts of the reply comments filed by ALTV in December, 1998. Nonetheless, in light of the different format employed, we are providing copies for inclusion in the record.

We would appreciate your directing any questions concerning this matter to the undersigned.

Very truly yours,

James J. Popham
Vice President, General Counsel

cc: Attached list
Enclosures

No. of Copies rec'd 0+1
List ABCDE

1320 19th Street, NW, Suite 300 • Washington, DC 20036 • tel 202.887.1970 • fax 202.887.0950

altv
ASSOCIATION OF LOCAL TELEVISION STATIONS

December 14, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Mr. Chairman:

The Commission soon will be determining whether to apply must carry rules to local television stations' DTV signals during the transition from analog to digital television service.

ALTV submits the issue is very simple. No local television station may be expected to launch digital service timely and successfully if cable systems may interdict their DTV signals and effectively prevent over sixty per cent of the stations' potential audience from the viewing their DTV signals. Nonetheless, cable interests have lofted a barrage of arguments designed to obfuscate and obscure this seminal issue. By having the Commission focus on the trees instead of the forest, they hope to forestall implementation of vitally necessary must carry rules, preserve the digital turf for themselves, and use their dominant position in the video marketplace to diminish and impoverish their most popular competitor -- local broadcast television.

Indeed, as ALTV suggested in its reply comments, they proffered "more lame excuses for opposing DTV must carry than Disney has dalmatians." In response, ALTV delineated and disposed of 34 of such excuses. Over the next few weeks, we will be sending you a series of 33 excuses and responses as articulated in our reply comments. Each "excuse" will be brief, sometimes only a page. The will not necessarily arrive in sequential order. We hope they will draw your attention to this critical issue and lead you to a better understanding of our positions and concerns.

Sincerely,

David L Donovan
Vice President, Legal & Legislative Affairs

James J. Popham
Vice President, General Counsel

1320 19th Street, NW, Suite 300 • Washington, DC 20036 • tel 202.887.1970 • fax 202.887.0950

The Honorable William Kennard
Chairman

The Honorable Gloria Tristani
Commissioner

The Honorable Susan Ness
Commissioner

The Honorable Harold Furchtgott-Roth
Commissioner

The Honorable Michael Powell
Commissioner

Mr. Tom Power
Senior Legal Advisor to the Chairman

Ms. Marsha MacBride
Legal Advisor
Office of Commissioner Michael Powell

David Goodfriend, Esq.
Legal Advisor
Office of Commissioner Susan Ness

Mr. Rick Chessen
Senior Legal Advisor
Office of Commissioner Gloria Tristani

Ms. Helgi Walker
Senior Legal Advisor
Office of Commissioner Harold
Furchtgott-Roth

Deborah A. Lathen
Chief
Cable Services Bureau

William H. Johnson
Deputy Chief
Cable Services Bureau

Deborah Klein
Chief
Consumer Protection and Competition
Division
Cable Services Bureau

Susan Fox
Deputy Chief
Mass Media Bureau

ASSOCIATION OF LOCAL TELEVISION STATIONS

December 14, 1999

The Honorable Susan Ness
Commissioner
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Commissioner Ness:

The Commission soon will be determining whether to apply must carry rules to local television stations' DTV signals during the transition from analog to digital television service.

ALTV submits the issue is very simple. No local television station may be expected to launch digital service timely and successfully if cable systems may interdict their DTV signals and effectively prevent over sixty per cent of the stations' potential audience from the viewing their DTV signals. Nonetheless, cable interests have lofted a barrage of arguments designed to obfuscate and obscure this seminal issue. By having the Commission focus on the trees instead of the forest, they hope to forestall implementation of vitally necessary must carry rules, preserve the digital turf for themselves, and use their dominant position in the video marketplace to diminish and impoverish their most popular competitor -- local broadcast television.

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ASSOCIATION OF LOCAL TELEVISION STATIONS

December 14, 1999

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Commissioner Furchtgott-Roth:

The Commission soon will be determining whether to apply must carry rules to local television stations' DTV signals during the transition from analog to digital television service.

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Vice President, General Counsel

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December 14, 1999

The Honorable Michael Powell
Commissioner
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Commissioner Powell:

The Commission soon will be determining whether to apply must carry rules to local television stations' DTV signals during the transition from analog to digital television service.

ALTV submits the issue is very simple. No local television station may be expected to launch digital service timely and successfully if cable systems may interdict their DTV signals and effectively prevent over sixty per cent of the stations' potential audience from the viewing their DTV signals. Nonetheless, cable interests have lofted a barrage of arguments designed to obfuscate and obscure this seminal issue. By having the Commission focus on the trees instead of the forest, they hope to forestall implementation of vitally necessary must carry rules, preserve the digital turf for themselves, and use their dominant position in the video marketplace to diminish and impoverish their most popular competitor -- local broadcast television.

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December 14, 1999

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Commissioner Tristani:

The Commission soon will be determining whether to apply must carry rules to local television stations' DTV signals during the transition from analog to digital television service.

ALTV submits the issue is very simple. No local television station may be expected to launch digital service timely and successfully if cable systems may interdict their DTV signals and effectively prevent over sixty per cent of the stations' potential audience from the viewing their DTV signals. Nonetheless, cable interests have lofted a barrage of arguments designed to obfuscate and obscure this seminal issue. By having the Commission focus on the trees instead of the forest, they hope to forestall implementation of vitally necessary must carry rules, preserve the digital turf for themselves, and use their dominant position in the video marketplace to diminish and impoverish their most popular competitor -- local broadcast television.

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Sincerely,

David L Donovan
Vice President, Legal & Legislative Affairs

James J. Popham
Vice President, General Counsel

ASSOCIATION OF LOCAL TELEVISION STATIONS

December 14, 1999

William H. Johnson
Deputy Chief
Cable Services Bureau
Federal Communications Commission
445 12th. Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Bill:

The Commission soon will be determining whether to apply must carry rules to local television stations' DTV signals during the transition from analog to digital television service.

ALTV submits the issue is very simple. No local television station may be expected to launch digital service timely and successfully if cable systems may interdict their DTV signals and effectively prevent over sixty per cent of the stations' potential audience from the viewing their DTV signals. Nonetheless, cable interests have lofted a barrage of arguments designed to obfuscate and obscure this seminal issue. By having the Commission focus on the trees instead of the forest, they hope to forestall implementation of vitally necessary must carry rules, preserve the digital turf for themselves, and use their dominant position in the video marketplace to diminish and impoverish their most popular competitor -- local broadcast television.

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Excuse Number **1**

Section 614 Does Not Require DTV Must Carry Rules During the Transition Because Only Signals "Which Have Been Changed" Are Subject To Must Carry.

The cable industry argues that Congress has granted the FCC no authority to adopt rules requiring carriage of local television stations' DTV signals during the transition. Cable interests argue that Section 614 requires carriage of digital signals only after the transition, when local television stations cease to broadcast an analog signal. They seize on a phrase in Section 614(b)(4)(B) stating that carriage requirements are limited to signals "which have been changed" to conform to DTV transmission standards.

Their arguments are specious. First, they wrongly assume that section 614(b)(1)(B) has no application to digital signals. However, as already established in comments filed by ALTV and others, the basic must carry requirement extends to digital as well as analog signals. No other interpretation of the plain language of the statute makes sense. Indeed, if cable interests are so willing to ignore the plain language of a statute, why have they not come forward to suggest that the cable compulsory license in Section 111 of the Copyright Act does not apply to local television stations' digital signals? Congress had no inkling of digital television in 1976, when it enacted the compulsory license. Nonetheless, its plain language -- "a broadcast station licensed by the Federal Communications Commission" -- arguably covers a DTV transmission from a licensed broadcast television station no less than an analog transmission from the station. The same must be said for section 614(b)(1)(B). Therefore, seeking to determine the scope of the must carry rule within the narrow confines of section 614(b)(4)(B) is a faulty approach.

Second, the cable industry's interpretation leads to a nonsensical result -- something which may not be ascribed to Congress in construing a statute.[1] If must carry is limited to signals "which have been changed" to conform to DTV transmission standards, few local television stations' DTV signals ever would be entitled to must carry. To effectuate the transition, the FCC has assigned a second channel to every local television station from a table of DTV allotments. That second channel has been assigned only for DTV operation, based on interference standards which assume broadcast of a DTV signal on the channel. Every local station which elects to construct DTV facilities will commence their DTV operations on that assigned channel. Some have done so already. Meanwhile, they continue to broadcast their analog signal on their assigned analog channel in the FCC's analog table of allotments for the duration of the transition. At the close of the transition, most stations will continue to broadcast their DTV signal on their

[1] *See* NCTA Comments at 15, *citing U.S. v. Turkette*, 452 U.S. 576, 580 (1981).

assigned DTV channel. Thus, their DTV signal never will change; it will have been a DTV signal conforming to digital broadcast transmission standards from the first electron pulsing out of the antenna through the transition and into the *post*-transition phase.[2] Neither will their analog signals change. They will discontinue broadcasting on their analog channels and return them; they will not *change* them to digital broadcast channels. Therefore, under the cable industry's hyper-literal embrace of section 614(b)(4)(B), such station's DTV signal would not be eligible for must carry because neither its analog nor digital signals ever will have changed.[3]

Furthermore, under cable's interpretation, only stations which return their DTV channel and *change* the signal on their current analog channel to conform to DTV broadcast transmission standards would eligible for must carry. Consequently, some stations would enjoy must carry; others would not. Such a result makes no sense, as so rightly observed by A&E Television Networks, "If all eligible broadcasters are not carried... There is no coherent rationale for imposing must carry requirements." Nothing in the statute or legislative history even hints that Congress contemplated such an arbitrary and senseless distinction between stations which elected to keep their DTV signals on their DTV channels and those which elected to switch their DTV signals to their analog channels.[4] Indeed, such an approach would be fundamentally inconsistent with Congress's determination to extend must carry protection to all local television stations.

Cable interests also point to a secondary definition of "change" in another vain attempt to invoke section 614(b)(4)(B) as an obstacle to the application of DTV must carry during the transition.[5] NCTA quotes in an elliptical fashion from the definition of "change" from the *Random House College Dictionary*, hinging its argument tenuously to the part of the definition which focuses on change as an "exchange" rather than a transformation. Putting aside for the moment whether this

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[2]As Time Warner Cable observes, "[T]ransitional DTV signals will begin broadcasting in the digital format at their inception -- they will not be "changed" from analog to digital, they will always have been digital." Time Warner Cable Comments at 33.

[3]As Time Warner Cable asserts:

> Only those analog broadcast signals "which have been changed" to meet the Commission's modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals.

Time Warner Cable Comments at 32-33.

[4]Those stations with analog channels outside the core channels would have no choice in the matter at all. They will have to maintain their DTV signals on their assigned DTV channels. Thus, they would be denied must carry by the very fact of their channel assignments in the Commission's table of allotments.

[5]*See Webster's New Collegiate Dictionary*, G. & C. Merriam Co., Springfield, MA (1959). ALTV notes respectfully that neither this edition of Webster (at 138), nor *The New Roget's Thesaurus in Dictionary Form*, G.P. Putnam's Sons, New York (1964), at 85, lists "exchange" or "substitute" as a synonym for the verb "change." Congress did use change as a verb, not as a noun, in section 614(b)(4)(B).

definition of change is what Congress had in mind when it enacted section 614(b)(4)(B), NCTA's interpretation of the statute would lead to a ludicrous result. Again, many stations would stand to be denied eligibility for must carry. According to NCTA:

> This change -- this "exchange for something else, usually of the same kind" will occur at the end of the transition. A broadcaster will exchange its spectrum granted for analog transmission for other spectrum. To impose must carry before the "exchange" or "substitution" has occurred violates the plain meaning of the words Congress chose.[6]

This interpretation of the statute, therefore, is based on the erroneous notion that local television stations necessarily will exchange their analog channels for their digital channels at the end of the transition. However, many stations may elect to keep their analog channel rather than exchange it for their assigned DTV channel. These stations will switch their DTV operations to their analog channels. Under NCTA's interpretation, because these stations did not "exchange" their analog channels for their digital channels, they would be ineligible for must carry. In like vein, these stations hardly could be said to have "substituted" their DTV channels for their analog channels, which remained their operating channels after the transition. Again, they would be denied must carry, while other stations which surrendered their analog channels, "exchanged" them for their assigned DTV channels or "substituted" their DTV channels for their analog channels, would be entitled to must carry. This result also is absurd and nonsensical and, as above, unworthy of attribution to Congress in crafting the statute.

Third, Time Warner misplaces its argument based on the "which have been changed" phrase in section 614(b)(40(B) on an an ill-concealed shift in focus from signals to stations. Thus, after stating that only "those analog broadcast signals 'which have been changed'" might be eligible for must carry, it segues into focusing on *stations* which have (or have not) changed:

> Only those analog broadcast *signals* 'which have been changed' to meet the Commission's modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals. During the transition period, all pre-existing local commercial television stations will continue to broadcast analog signals. Such *stations* will not be changed to conform to the new DTV standards until the transition has been completed....Only upon the completion of the transition will any *stations* be changed from analog to digital, and only then can the Commission impose any DTV carriage obligations. [7]

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[6]NCTA Comments at 11.

[7]Time Warner Cable Comments at 33 [italics supplied].

Such a semantic sleight of hand deserves a wink and a smile, perhaps, but no weight in the Commission's efforts to interpret the statute. The phrase "which have been changed" modifies "signals" in the context of the paragraph. It is signals, not stations, which are subject to "standards for television broadcast signals." Furthermore, if as Time Warner Cable states, "Only those analog broadcast signals 'which have been changed' to meet the Commission's modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals," then, as noted above, the stations which elect to maintain their DTV operations on their assigned DTV channels would be denied must carry. Again, cable interests' efforts to transform section 614(b)(4)(B) into a limitation explode in a vapor of nonsense.

Fourth, cable interests' interpretations leave the Commission with the obligation to commence a proceeding *now* to adopt rules which would not apply until 2006! This, too, elevates the need for advance planning to the level of the absurd. Congress certainly expects the Commission to conduct its affairs with reasonable dispatch, but why commence a rule making some eight years in advance? Is the Commission meant to adopt the rule now or hold the proceeding open for six years? In light of the reply comment deadline nearly a year ago, is one to assume that the Commission will mull them over for six years or that it will adopt a rule now with an effective date well into the next millennium? No rational basis exists for attributing such ridiculous notions to Congress.

Cable interests reliance on Section 614(b)(4)(B), thus, not only is misplaced, but also strained and ultimately nonsensical. They provide no statutory excuse for the Commission to defer DTV must carry until the transition is accomplished.

Excuse Number 2:

Section 614(b)(5), Which Permits Cable Operators to Refuse Carriage of Stations with Programming Which Substantially Duplicates or Affiliated with the Same Network as Another Station Carried on the System, Defeats the Requirement That a Local Television Station's Analog and Digital Signals Be Carried.

Cable owners make much of section 614(b)(5), which permits cable operators to refuse carriage of stations with programming which substantially duplicates or affiliates with the same network as another station carried on the system. They note, in particular, that local television station's DTV signals increase only during the transition will duplicate the programming of its station's analog signals.

What they ignore in the process is the unambiguous language of section 614(b)(5), which limits its scope of the loophole to signals provided by *different television stations*. Cable systems might refuse carriage only with respect to "the signal of any local commercial station that substantially duplicates the signal of *another* local commercial television *station*" or "more than one local commercial television *station* affiliated with a particular broadcast network."[1] By its plain language, the section 614(b)(5) exception does not apply to two signals from the *same station*. Therefore, it hardly may be said to defeat a DTV must carry requirement or demonstrate any Congressional intent to deny DTV signals must carry status during the transition.

[1] 47 U.S.C. §534(b)(5).

Excuse Number 3:

Section 614(b)(3)(A), Which Requires Carriage of the Primary Video of Local Television Stations, Negates the Requirement That Cable Systems Carry Both the Analog and DTV Signals of Local Commercial Television Stations.

In yet another convulsive attempt to throw a fog on the legal tracks toward implementation of DTV must-carry rules cable interests describe Section 614(b)(3)(A), which requires cable systems to carry, *inter alia*, the primary video of local television stations, as an impediment to adoption of DTV must carry rules.

The fundamental premise of the cable interests' arguments is faulty. Time Warner, for example, scoffs that the "suggestion in the NPRM that there could possibly be more than one 'primary video' transmission stretches the bounds of semantics and credulity." Time Warner goes on to proclaim that "By definition, no broadcast licensee can have more than one 'primary video' transmission." No semantic basis exists for Time Warner's insistence that multiple primary transmissions are a definitional impossibility. One need only remember the number of *primary* colors -- not one, but three. Three primary video signals are no less impossible according to Webster than three primary colors.[1] Thus, contrary to Time Warner's contention that "'primary' has only a singular meaning,'" primary may connote multiple primaries. Without this essential foundation of the singularity of the concept of primary, cable interests' arguments crumble completely. They may argue that a local television station's analog signal should be considered primary and its DTV signal subordinate, but they then ignore that neither need be secondary if both may be primary.[2] They may argue that local television stations' broadcast of analog and digital signals under one license as one station precludes a conclusion that multiple video signals may fall within the scope of "primary video," but, again, they ignore that a single station may transmit multiple primary video signals. Cable interests, therefore, may not raise section 614(b)(3)(A) as an obstacle to adoption of rules implementing must carry for DTV as well as analog signals.

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[1] *See Webster's New Collegiate Dictionary,* G. & C. Merriam Co., Springfield, MA (1959) at 680.

[2] Beyond expressing disdain for broadcasters' entry into digital television, this position is no more than wishful thinking. Time Warner states that analog will remain primary until the station "surrenders its analog frequency and engages exclusively in DTV transmissions." The only basis for such an assertion is the supposition that "a broadcaster's analog signal will continue to attract the majority of viewers during the transition period." What Time Warner's premise really suggests then is that at some point in the transition a station's DTV signal would become primary because the DTV signal would garner a larger audience. This logical extension of the cable interests' arguments, however, runs headlong into cable interests' arguments that DTV must carry is unauthorized during the transition.

Excuse Number 4:

Section 614(B)(7), Which Requires That Signals Be Provided to Every Subscriber and Viewable on All Their Receivers, Bars Imposition of DTV Must Carry Requirements.

Cable interests distort Section 614(b)(7) into yet another reason to let cable operators decide the fate of broadcast DTV signals -- and broadcast DTV as an invaluable service to consumers.

First, NCTA would have the Commission read section 614(b)(7) to require cable operators to provide a set top box which downconverted a DTV signal to analog to assure that the DTV signal was viewable on all sets, including analog sets. Congress could not have meant this, says NCTA. ALTV agrees. This provision reflected the concern that cable systems were not providing local signals to all sets, usually because the local station's signal was placed on a channel which could be received only with a converter box. Consequently, many consumers with multiple sets could view all local signals only on their main set, which alone was connected via a set top box. Other sets in the household often were connected directly to the cable with no box. In an era in which many sets were not "cable ready" (and on some cable systems, regardless), those second and third sets simply could not receive the channels on which some local stations were transmitted on the cable system. Congress, therefore, sought to assure that signals were available to all sets even if a converter box were required. However, once the signal was available at the output of the cable or cable set top box on a channel which the set could receive, then the problem was solved. In essence, the provision just assured that some stations were not excluded by virtue of the fact that the cable system provided them on channels (frequencies) outside the reception range of a set.[1] In the DTV environment, this section would require no more. Any DTV signal would have to be provided on a channel (frequency) within the reception range of the television receiver.[2] In other words, the cable system would be responsible as it is now in the case of analog signals to assure that the DTV signal of *every* local station reaches the input terminal of every set owned by a consumer on a frequency within the tuning range of the set.[3] At that point (assuming no other tampering with or

[1]For example, many cable systems employ the so-called mid-band channels to retransmit the signals of broadcast stations. These mid-band frequencies fall outside the range of frequencies tunable by a normal television receiver. Only cable-ready sets may tune in these channels in the absence of a set-top converter box.

[2]In the strict sense of the word, the signal would be viewable, although, perhaps, as snow. The point, however, is that the signal could be received.

[3]As a practical matter, consumers are unlikely to insist on the availability of broadcast DTV signals unless the consumer has purchased or intends to purchase a DTV receiver or converter. Moreover, none of this should obscure that no consumer is likely to consider purchasing a DTV receiver or converter unless local

degradation of the signal), the cable operator's responsibility ends. Whatever happens once the signal is available and can be tuned in by the receiver, the cable operator has complied with the rule.

Time Warner similarly would force this strained, literal reading of section 614(b)(7) on the Commission to defeat the DTV must carry requirement. Again, however, the fact that analog receivers will not be able to display a viewable picture from an unconverted DTV signal in no way suggests that a cable operator providing a DTV signal to consumers' sets on a broadcast channel tunable by the set has fallen short of compliance with the rule. What cannot happen with DTV signals any more than with analog signals under the rule is the functional exclusion of some stations due to the transmission frequency and system architecture employed by the cable operator.

Tying the rule to the extremely literal concept of viewability not only distorts the true purpose of the rule, but leads to much more ridiculous results. The cable system would bear responsibility for the operation of the consumer's receiver. If the consumer's set produced an unviewable picture due to an internal malfunction, then, according to NCTA's interpretation, the cable operator would have to come in and fix the set to assure the signal was viewable.[4] Therefore, section 614(b)(7) must be read with cognizance of the problem it was designed to solve, not in a manner which leads to a ridiculous result. Read properly, it fits in neatly with requiring carriage of DTV signals under section 614.

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stations' DTV signals will be available on his or her cable system when the DTV set is delivered and connected to the system.

[4]Even NCTA, to its credit, imparts some sense of the strain inherent in its argument with phrasing such as, "the FCC...*might well*...compel cable operators to provide all subscribers a box so that a digital signal would be "viewable" on every analog set...." NCTA Comments at 15 [emphasis supplied].

Excuse Number 5:

The One-Third Cap on Channel Capacity Devoted to the Signals of Local Television Stations in Section 614(B)(1)(B) Undermines Operation of DTV Must Carry During the Transition.

As if no portion of section 614 may be ignored in conjuring up reasons why section 614 would not accommodate DTV must carry requirements, cable interests also point to the one-third cap on channels to be devoted to carriage of local signals in section 614(b)(1)(B) as yet another impediment to DTV must carry. With notable irony, they suggest that a provision designed to assure that cable operators suffer no excessive burden under must carry rules might be applied in such way as to undermine effectiveness of the rule. Some argue that cable systems would carry the analog *and* digital signals of only the most popular stations. Another stews that no room would be left for digital stations. Yet another stews that no room would be left for analog stations. Thus, they say, DTV must carry would engender perverse results.

Their concerns, however, are unjustified. First, the precise application of the one-third cap with respect to digital signals is unsettled. The Commission, for example, has raised the possibility of setting carriage priorities. It also has sought comment on the definition of channel capacity, as well as separate capacity calculations for analog and digital signals. Golden Orange Broadcasting has submitted a compelling argument that local television station signals carried pursuant to retransmission consent rather than must carry ought be excluded from signals counted towards the one-third cap. The Commission's ultimate decisions on these and other related issues easily could alleviate the counterproductive results forecast by cable interests.

Second, cable interests' woeful predictions are based on alleged capacity shortfalls which are self-serving and myopic. For example, they assume that a cable system would be required to devote a full six MHz of bandwidth to every analog and digital signal carried. In the digital age, this is a technical anachronism. With ever improving compression technology, cable systems will be able to furnish local television stations' analog signals on digital systems (or digital portions of analog systems) using much less than six MHz of bandwidth. Indeed, multiple converted analog signals may be converted to compressed, digital signals and transmitted in six MHz of bandwidth...something done today by DBS providers. Thus, cable systems with digital capability will be able to transmit their analog broadcast stations (and cable networks) using much less than six MHz of bandwidth per channel. This will leave considerable capacity (even under the one-third cap) for transmission of high bit rate broadcast DTV (as well as other capacity hungry cable HDTV program services). Cable systems also may transmit at twice

the bit rate of terrestrial broadcast transmissions, again, expanding the carriage capacity of their systems within existing bandwidth.

In short, as Zenith concludes:

> In the near term, however, digital video compression and robust modulation will provide sufficient channel capacity (bandwidth) for cable operators to carry both digital and analog terrestrially broadcasted programs.[1]

Therefore, cable interests' arguments that the one-third cap will eviscerate an analog/digital must carry requirement during the transition ignore reality. Section 614(b)(1)(B) may restrict carriage of must carry signals without materially diminishing the beneficial effects of the basic must carry requirement.

[1]Zenith Comments at 12. The above discussion of cable channel capacity barely scratches the surface. The record includes substantial evidence that digitally-capable and other high capacity cable systems will have no difficulty accommodating the increased carriage demands of the DTV must carry obligation. *See, e.g.*, NAB Comments at 25-35.

Excuse Number 6:

The Lack of Congressional Findings Relating to DTV Must Carry Indicates That Congress Never Intended that the Commission Adopt DTV Must Carry Rules.

Cable interests contend that the lack of specific findings about DTV indicates that Congress never intended to enact DTV must-carry requirements.

They err. First, the bulk of the findings advanced in support of the must carry law apply equally to digital and analog signals. It makes little difference whether a station is providing a digital signal or an analog signal or both. Signals not carried are unavailable to over 60 per cent of the television audience whether they are analog or digital. Congress, therefore, made no distinction between analog and digital signals transmitted by local television stations, except to direct the FCC to modify the must carry rules adopted pursuant to section 614 to ensure that digital signals were carried once the technical standards for DTV transmissions were adopted by the Commission. This is a far cry from making no findings pertinent to carriage of DTV signals.

Second, the absence of express findings about DTV means nothing. DTV broadcasting did not exist at the time. This hardly detracts, however, from the applicability of "generic" findings about the significance of broadcasting to the public (and those without cable, in particular), the monopoly position of local cable systems, the competitive incentive of cable systems to refuse to carry local television station signals, or the effect on the stations refused carriage. Therefore, statements like that of A&E that "the interests underlying possible carriage requirements for digital broadcast signals have not been well articulated, nor have they been adopted by Congress," have no merit whatsoever.

Third, and most revealing, Congress never made any finding that would support deferring DTV must carry until the transition is complete. Nothing in the findings supports the contention that Congress intended to leave DTV at the mercy of cable operators, especially in light of their monopoly power, historical reticence and ongoing incentives to deny carriage to many local television stations, and the devastating effect of noncarriage on those stations.

Therefore, contrary to the assertions of cable interests, Congressional findings in the 1992 Cable Act only buttress the applicability of the must carry requirement to local television stations' DTV signals.

Excuse Number 7:

Section 309(j) of the 1997 Balanced Budget Act Invalidates the Conclusion that Section 614 Requires Carriage of Local Television Stations' DTV as Well as Analog Signals.

Cable interests cite Section 309(j) of the 1997 Balanced Budget Act as confirming that Congress granted the FCC no authority to adopt DTV must carry rules.

Their position is unsound. As Time Warner states, nothing in the text of the 1997 Balanced Budget Act"even addresses the Commission's jurisdiction over digital must carry during the transition." Nonetheless, in the absence of support from the plain language of applicable statutes, cable interests resort to implications and legislative history. Neither is availing of their position. First, Time Warner wrongfully relies on the conference report, which states (in a less selective fashion than Time Warner's reference):

> The conferees emphasize that, with regard to the inquiry required by section 309(j)(14)(B)(iii)(I) into MVPD carriage of local digital television service programming, Congress is not attempting to define the scope of any MVPD's "must carry" obligations for digital television signals. The conferees recognize that the Commission has not yet addressed the "must carry" obligations with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.[1]

According to Time Warner, this provision indicates that:

> Congress assiduously avoided any deviation from its strict instructions to the Commission in the 1992 Cable Act not to consider imposing digital must-carry on cable systems until the transition from analog to digital has been completed.[2]

ALTV respectfully submits that the quoted language (including the introductory clause omitted by Time Warner) indicates no more than it says: Section 309(j) does not indicate a Congressional judgment about the *scope* of DTV must carry, which it already had left to the FCC. This language, thus, assumes that DTV must carry rules will be adopted by the Commission. However, it says nothing about *when* those should be adopted or *what* their precise scope might be.

Second, both NCTA and Time Warner erroneously embrace Section 309(j) as implying that a DTV must carry requirement during the transition would be

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[1]H.R. Conf. Rep. No. 109, 105th. Cong., 1st. Sess. 6175 (1997)[hereinafter cited as "1997 Conf. Rep."].

[2]Time Warner Cable Comments at 43.

contrary to Congressional intent. Time Warner contends that Congress could not have contemplated DTV must carry during the transition because it inserted the modifying clause "that carries one of the the digital television service programming channels of each of the television stations broadcasting such a channel in such market." In a must carry environment, Time Warner asserts, this clause would have been unnecessary, because affected cable systems already would be carrying local television stations' DTV signals. Time Warner's interpretation makes sense only if it might rewrite the statute to fit its argument. Section 309(j)(14)(B)(iii)(I) does not, as Time Warner suggests, refer only to cable systems. It refers to "a multichannel video programming distributor."[3] A cable system certainly is a multichannel video programming distributor, but not the *only* type of multichannel video programming distributor. Therefore, even if cable systems were subject to DTV must carry requirements during the transition, the modifying clause is essential to limit the provision's application to only those other multichannel video providers (not subject to must carry) which carry local stations' DTV signals. Time Warner's argument, consequently, is fundamentally unsound.

Time Warner also argues in a flawed fashion that because the conditions in both paragraphs (a) and (b) of subsection (II) must be satisfied to close out the transition, Congress envisioned a world without DTV must carry during the transition. ALTV respectfully suggests that paragraphs (a) and (b) are connected by an "or" not an "and." Thus, both need not be satisfied. Therefore, ALTV assumes that Time Warner really meant to refer to subsections (I) and (II), which, notably, do suffer the conjunction "and" between them. Thus, in order for the transition to continue beyond 2006, at least 15 per cent of the television households in a market must remain unable to receive DTV because they do not subscribe to an MVPD that carries local stations' DTV signals *and* do not have a DTV receiver *or* converter. Time Warner posits that Congress "'recognized that the successful transition of broadcast television from analog to DTV can be measured by the ability of viewers to receive DTV broadcasts off-the-air, without any assistance from cable systems." What Time Warner fails to comprehend is that a Congress contemplating the existence of DTV must carry for cable during the transition would have written this provision in exactly the same way! Time Warner's argument, therefore, proves nothing.

Lastly, Time Warner makes a similar argument based on the notion that a market will be *post*-transition in 2006 even if at least of 85 per cent of the television households have DTV converters and no cable service. Again, however, this proves nothing. Congress had to allow for availability of DTV signals via both MVPDs and off-air reception. However, it said and meant nothing in Section 309(j)(14)(B)(iii) about DTV must carry one way or the other.

NCTA's point is no more availing. NCTA calls Section 309(j)(14)(B)(iii) not an accelerator, but brakes on the transition, thereby undermining the conclusion that Congress had espoused a government interest in expediting the transition. This ignores that Congress set a deadline on the transition. The "safety valve" in Section

[3] 47 U.S.C. §309(j)(14)(B)(iii)(I).

309(j)(14)(B)(iii) in no way detracts from Congress's primary goal of fostering rapid development and return of analog spectrum for auction. NCTA essentially is saying that the existence of a safety valve on a steam locomotive indicates that the railroad has no interest in running its trains on time.

When all is said and done, Section 309(j)(14)(B)(iii) is a giant zero *vis-a-vis* cable interests' arguments that it reveals the intent of a Congress five years prior to defer DTV must carry to the close of the transition.

Excuse Number 8:

The Legislative History of the 1992 Cable Act Indicates That Congress Never Intended DTV Must Carry Rules to Apply During the Transition.

Cable interests simply sidestep the plain statutory language of Section 614 and, again, seize upon the repetition of the "which have been changed" language in a futile attempt to impose their gloss on Congressional intent. They point to the same language in the legislative history referring to signals "which have been changed" to establish supposed Congressional intent that DTV must carry must await the end of the transition.

Again, their interpretation is severely flawed, leading to the same unacceptably absurd consequences as their argument based on the statutory language itself. Again, whereas they remonstrate that "not a shred of evidence illustrating a Congressional intent to impose simultaneous DTV and analog must-carry regime can be found in the legislative history," they ignore the plain language of section 614 that requires carriage of "the signals of local commercial television stations" without regard for whether the signal is digital or analog. Thus, their arguments, again, advance their case not a millimeter (silly or otherwise).

Excuse Number 9:

The Legislative History of the 1996 Telecommunications Act Confirms Congressional Intent that the 1992 Cable Act Provided No Must Carry Requirement for DTV During the Transition.

Cable interests launch a triple thrust attack on DTV must carry based on the legislative history of the 1996 Telecommunications Act.

First, they argue that Congress knew about DTV in 1996, but said nothing. So... Why would Congress say anything then about a law enacted four years and two Congress's previously? The courts would pay little heed to such pronouncements in the legislative history of subsequent laws.[1] Moreover, why should Congress have to interpret and reinterpret what is plain and unambiguous in the 1992 Cable Act?

Second, they err in relying on Section 336 of the 1996 Act, which denies the Commission authority to adopt must carry requirements for ancillary and supplementary DTV services. This provision obviously has nothing to do with must carry for free, broadcast DTV services transmitted in local television stations' DTV signals.

Third, they emphasize legislative history which says, indeed, that Section 336(b)(3) does not confer must carry on DTV.[2] No-duh! Why would Congress impose DTV must carry *again* when it already had done so in the 1992 Cable Act? Therefore, cable interests fail to offer anything remotely probative of Congressional intent with respect to Section 614 and the 1992 Cable Act with their empty rhetoric based on the 1996 Telecommunications Act.

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[1] *United States v. Southwestern Cable Company*, 392 U.S. 157, 170 (1968) [hereinafter cited as *Southwestern Cable*] ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.').

[2] Discovery puts a new slant on this argument by rewriting the language to support its argument. Discovery quotes the pertinent portion of the Conference Report as follows:

> [T]he conferees do not intend [section 614(b)(4)(B)] to confer must carry status on advanced television or other video services offered on designated frequencies...

Discovery Comments at 33, *citing* "H. REP. NO. 104-458, at 161 (1996)". Contrast this rendition of the report with Time Warner's, which correctly cited the conference report, as follows:

> [W]ith respect to paragraph (b)(3), the conferees do not intend this paragraph to confer must carry status on advanced television or other video services offered on designated frequencies...

[2] Time Warner Comments at 42, *citing* "H.R. Conf. Rep. No. 458, 104th. Cong., 2d sess. 161 (1996)." Discovery also leaves a strong implication that this language is part of the legislative history of Section 614(b)(4)(B), which, of course, it is not.

Excuse Number 10:

The Legislative History of the 1997 Balanced Budget Act Confirms Congressional Intent that the 1992 Cable Act Provided No Must Carry Requirement for DTV During the Transition.

In yet another effort to conjure a credible argument from thin air, cable interests turn without success to the legislative history of the 1997 Balanced Budget Act. They cite the following language:

> The conferees emphasize that, with regard to the inquiry required by section 309(j)(14)(B)(iii)(I) into MVPD carriage of local digital television service programming, Congress is not attempting to define the scope of any MVPD's "must carry" obligations for digital television signals. The conferees recognize that the Commission has not yet addressed the "must carry" obligations with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.

Time Warner characterizes this language as a reiteration that the Commission must adhere to Section 614(b)(4)(B).

ALTV is inclined to agree.[1] Where ALTV and Time Warner differ is on the meaning of section 614. What is abundantly clear is that Congress "simply affirmed that Section 309 had nothing to do with the must carry requirements and acknowledged the obvious, namely, that the Commission had yet to deal with the matter, but would do so in the future." Section 309's legislative history, therefore, in no way undercuts section 614 or suggests that it did not contemplate DTV must carry requirements during the transition.

[1] Indeed, Section 614(B)(4)(b) makes sense only in a context in which the basic must carry obligation is established -- as it is in this case by Section 614(b)(1)(B).